No. 93-1738

(2)

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IN THE

Supreme Court of the United States

October Term, 1993

In the Matter of the complaint of MARINE RECREATIONAL OPPORTUNITIES, INC., as owner of a 1987 CRUISERS, INC. 286 Rogue Sport for exoneration from or limitation of liability,

Petitioner,

against

GERALD BERMAN and JOSEPHINA BERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD D. TUNICK
Counsel of Record
Attorney for Respondents
225 Broadway
New York, NY 10038
(212) 619-7100

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
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No. 93-1738

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In the Matter of the complaint of MARINE RECREATIONAL OPPORTUNITIES, INC., as owner of a 1987 CRUISERS, INC. 286 Rogue Sport for exoneration from or limitation of liability,

Petitioner,

-v.-

GERALD BERMAN and JOSEFINA BERMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

In its petition for certiorari, petitioner has presented an incomplete analysis of the holding of the Court of Appeals. For the following reasons, certiorari should be denied:

1. the Court of Appeals based its

decision on two adequate grounds, only one of which has been presented for review by the petitioner;

2. the Court of Appeals' decision is not in conflict with any other circuit and is, in fact, in accord with a decision of the Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

The Court is respectfully referred to the decision of the Court of Appeals, reproduced at pages 1a through 6a of the petition, for an accurate statement of the backgound facts giving rise to that Court's holding.

The petitioner has based its application for a writ of certiorari on the sole ground that the court below erred in holding that a prior owner of a vessel, who at the time of the maritime accident exercised no dominion, possession, management or control over the vessel, did not have the right to petition for

exoneration or limitation of liability pursuant to 46 U.S.C. 183, et seq. While that was undoubtedly the primary ground upon which the Court of Appeals affirmed the dismissal of the petition, the petitioner failed to mention that the Court further held that the petition had to be dismissed because petitioner was not being sued in the capacity of owner of the vessel. (See, at p. 4a top). This second basis for dismissal of the original petition in limitation is critical to this Court's consideration of the within petition for certiorari.

WHY THE PETITION SHOULD BE DENIED

I. The Court below based its opinion on two independent and adequate grounds, only one of which has been presented to the Court in the within petition.

The Court below found that petitioner was not entitled to the benefits of the limitation statute "because it was not the owner of the p/c Rogue Sport at the time of the accident, and it is not being sued in that capacity" (emphasis

supplied). The fact that petitioner was not being sued as an owner of the vessel, while not extensively discussed in the lower court opinion, goes to the heart of the application of the Limitation Act to this particular controversy.

The Limitation Act specifically excludes from coverage acts of negligence which are within the "privity or knowledge" of the owner of the vessel. The Supreme Court, in its affirmance of American Car & Foundry Co. v. Brassert, 289 U.S. 261, made this simple and oft cited observation:

> "The liability thus limited is an imputed liability; it is a liability imputed by law by reason of the ownership of the vessel. For his own fault, neglect and contracts the owner remains liable."

The Court of Appeals, in its opinion, reproduced at page 3a of the Petition recognizes that the Bermans, in their state court action, charge petitioner with active negligence in

failing to deliver the vessel with functioning trim tabs, with failing to inspect the trim tabs before delivery, with failing to warn the purchaser of a known dangerous condition and with failing to train the boat's purchaser in the operation of the vessel. None of these allegations charge the petitioner with imputed liability. If such active negligence be established, petitioner is not entitled to limitation. Many cases have held that an owner who delivers a vessel in unseaworthy condition due to defective equipment at the start of a voyage is not entitled to limitation because he is chargeable with knowledge of the existence of that condition. See Villers Seafood Co. v. Vest, 813 F.2d 339 (CA 11th, 1987); Re Reichert Towing Line, 251 F. 214 (2d Cir., 1918), cert den 248 U.S. 565 (1918); The Yungay, 58 F.2d 352 (S.D.N.Y., 1931); The Mattie, 38 F. Supp. 745 (E.D.N.Y., 1941), aff'd 136 F.2d 904 (2d Cir., 1943).

The recently decided case of Joyce v.

Joyce, 975 F.2d 379 (7th Cir., 1992) addresses this specific issue in a case remarkably similar to the case at bar. In that case, a passenger on a newly purchased pleasure boat suffered a severely fractured back when she was tossed about the boat after it struck the wake of another boat. The owner of the boat, who was not present, had permitted a third person to operate the vessel. The passenger had commenced a state court negligence action against the owner on a theory of negligent entrustment to a person not qualified to operate the vessel. Four days after the owner of the vessel filed a Limitation Act petition in the district court, and before any appearance or responsive pleading had been filed, the court, sua sponte, dismissed the petition for lack of subject matter jurisdiction.

In its decision, the Seventh Circuit first reviewed the history of the Limitation Act, making specific reference to the American Car & Foundry holding that "[F]or his own fault,

neglect and contracts the owner remains liable." The Court found that the judicial trend has been to enlarge the scope of activities within the privity and knowledge of the owner, "including...requiring shipowners to exercise an ever increasing degree of supervision and inspection".

The theories of liability alleged by the Bermans against petitioner in their state court action charge active negligence, much like the theory of negligent entrustment alleged in Joyce. Petitioner has been charged with failing to properly inspect the vessel prior to delivery to the new owner, in failing to properly maintain and service the trim tabs prior to such delivery, in placing the vessel in the hands of an inexperienced operator without training him or ascertaining whether he had the requisite skill to operate the vessel and in failing to warn the new owner of the danger of operating the vessel without functioning trim tabs. Each of these allegations entails a charge of active

negligence and fault on the part of petitioner.

The Seventh Circuit in Joyce, and both Judge Keenan in the district court and the Second Circuit in affirming, found that this is not the type of liability towards which the statute was directed. In Joyce, the Court succinctly stated: "if a shipowner knows enough to be liable for negligent entrustment, he knows too much to be eligible for limited liability under the Act". In dismissing the proceeding, the Court in Joyce held at 379 F.2d 385:

> "Given the nature of the tort of negligent entrustment, it is clear that the Limitation of Shipowner's Liability Act affords no protection to William. If William knew or had reason to know that Ivkovich should not have been entrusted with the boat, he not only committed the tort of negligent entrustment but also had either knowledge or constructive knowledge sufficient to place him beyond the protection of the Limitiation of Liability Act. On the other hand, if William did not entrust the boat to

> Ivkovich under the circumstances in which he knew or should have known of Ivkovich's inability, he will incur no liability for negligent entrustment, and, consequently, has no need of the Act's protection. In either case, the district court could not do anything to affect either party and was correct to dismiss the suit for lack of subject matter jurisdiction."

In the case at bar, the critical factor is that the allegations of negligence against petitioner derive from its own actions, not from the acts of Zachary Berman, who was neither an employee, servant nor agent of petitioner whose acts could be imputed to petitioner. Petitioner's liability will be determined by an assessment of its own conduct. If it is found to have committed the acts charged, it will be held responsible for its own fault. If the jury should exonerate petitioner from having committed the claimed negligence, it will have no need of the Limitation Act's protection.

II. The Court of Appeals decision is not in conflict with the decision of any other circuit.

Petitioner's contention that a conflict exists between the Circuits on the issue of whether a prior owner of a vessel, who had no ownership interest at the time of the maritime accident, may seek the protection of the Limitation Act is misleading and inaccurate. Petitioner's statement that the only case to address the issue is In re The Trojan, 167 F. Supp. 576, 578 (N.D. Cal. 1958), Aff'd sub nom, Todd Shipyards Corp. v. United States, 274 F.2d 402 (9th Cir. 1960) is simply untrue.

Many cases have addressed the issue of time of ownership for Limitation Act purposes and have unequivocally held that the appropriate period is the time of the maritime accident. American Car & Foundry Co. v. Brassert, 61 F.2d 162 (7th Cir., 1932), affd. 289 U.S. 261, 53 S. Ct. 618, 77 L. Ed. 1162; Calkins v. Graham, 667 F.2d 1292 (9th Cir., 1982); Complaint of Sheen, 709 F. Supp. 1123 (S.D.Fla., 1989). This weight

of authority caused Judge Keenan in the District Court to refuse to follow the "lonely path" of In Re Trojan and the Second Circuit to reach a similar conclusion.

The Ninth Circuit's affirmance of In Re Trojan was in a per curiam opinion which never discussed the issue of the right of a prior owner to seek the protection of the statute. Rather, the Ninth Circuit focused more on the fact that there were other claims being asserted in the proceeding which were "clearly subject to limitation." Of greater significance, is the fact that the petitioner has declined to mention that the Ninth Circuit, in a later decision, extensively discussed the issue of time of ownership for limitation purposes and came to the same conclusion reached in all other cases that the time of the maritime accident controls. Calkins v. Graham, 667 F.2d 1292 (9th Cir., 1982). Any doubt concerning the Ninth Circuit's position on the issue is dispelled by the following holding in Calkins:

"When the accident occurred, Calkins no longer had possession or control of the vessel, nor was he responsible for its maintenance and operation; Ballo was in possession and control and responsible for the vessel's maintenance and operation under her sales agreement with AOF. The circumstances which make one a "likely target," as in Admiral Towing, supra, 290 F.2d 641, must exist at the time of the accident or loss. See American Car & Foundry Co. v. Brassert, 61 F.2d 162, 164 (7th Cir.), aff'd 289 U.S. 261, 53 S. Ct. 618, 77 L. Ed. 1162 (1933), (the issue is 'whether [the party seeking to limit liability] was the owner of the boat at the time of the accident.').

* * * * * *

In our case Ballo was not in default on her sales agreement with AOF at the time of the accident and Calkins had no personal ownership or security interest in the Lucky One.

* * * * * *

Since Calkins has failed to show that he was an "owner" or "charterer" of the Lucky One at the time of the accident under any legal test, he is not entitled to limitation under 46 U.S.C. 183 or 186."

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

RICHARD D. TUNICK
Attorney for Respondents
225 Broadway
New York, New York 10038
(212) 619-7100

Richard D. Tunick

Of Counsel